

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:
VITAMINS ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:
Kellogg Company v. BASF AG, et al,
Civil Action No. 99-CV-1996 (TFH)

MDL No. 1285
Misc. No. 99-0197 (TFH)

FILED

MAR 21 2002

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

MEMORANDUM OPINION

Re: Motion to Strike Untimely Ratifications of Kellogg Company

Pending before the Court is defendants' Motion to Strike Untimely Ratifications.¹ The ratifications at issue were made by Kellogg on January 22, 2002 pursuant to Rule 17(a) of the Federal Rules of Civil Procedure.² Upon careful consideration of defendants' motion, plaintiffs' opposition, defendants' reply, and the entire record herein, the Court will deny defendants' motion to strike.

On May 29, 2001 defendants moved to dismiss all claims for damages based on vitamin

¹ The Motion to Strike Invalid Ratifications is brought by defendants BASF AG, BASF Corporation, Daiichi Pharmaceutical Co., Ltd., Daiichi Pharmaceutical Corporation, Daiichi Fine Chemicals, Inc., DCV, Inc., Degussa AG (f/k/a Degussa-Huls AG), Degussa Corporation (f/k/a Degussa-Huls Corporation), DuCoa, L.P., F. Hoffmann-La Roche Ltd., Hoffman-La Roche Inc., Roche Vitamins Inc., Lonza AG, Lonza Inc., Nepera Inc., Reilly Industries, Inc., Reilly Chemicals S.A., Rhone-Poulenc S.A., Rhone-Poulenc Animal Nutrition Inc., Rhone-Poulenc Ag Company, Inc., S.A.), Takeda Chemical Industries, Ltd., Takeda Vitamin & Food USA, Inc., Takeda U.S.A., Inc.

² Kellogg filed the following 8 ratifications: Kellogg India Private Limited; Kellogg (China) Limited; Kellogg (Thailand) Limited; Nordisk Kellogg's A/S; Kellogg Italia S.P.A.; Kellogg Company of South Africa (Pty.) Ltd.; Cereales Nacionales S.A.; Kellogg's Malaysia Manufacturing Sdn. Bhd.

purchases by plaintiffs' foreign and domestic non-party affiliates. In response, Kellogg requested leave to file a Third Amended Complaint adding language to include these claims and on May 21, 2001 Kellogg filed formal ratifications on behalf of 15 of its foreign affiliates. On June 7, 2001, the Court denied defendants' motion to dismiss and Court ordered that affiliates file formal notices of ratification "in the interests of caution and in order to ensure that defendants are fully protected against the risk of multiple recoveries." See In re: Vitamins Antitrust Litig., No. 99-197, 2001 WL 75582 at *3 n.6 (D.D.C. June 7, 2001) ("June 7 Opinion"). In so doing the Court noted that these ratifications may in fact be unnecessary given that the affiliates had represented that they agreed to be bound by the instant civil action. Id. The formal ratifications were ordered to be filed within 10 days of the June 7 Order. On January 22, 2002, Kellogg filed "supplemental original" ratifications. In response, defendants moved to strike these additional ratifications as untimely.

Defendants argue that the additional Kellogg ratifications should be stricken as inexcusably late, and that these ratifications really are an attempt by Kellogg to amend its complaint without seeking leave to do so. Defendants claim that Kellogg had more than ample time to secure and file these ratifications within the period prescribed by the Court's June 7 Order and have offered no excuse as to why these are late filed. As such, defendants argue the Court should in accordance with its June 7 Order dismiss the claims. See June 7 Order (ordering all affiliates to file formal notification within 10 days of the order or "the claims brought by these affiliates will be dismissed"). Defendants further claim that allowing ratifications at this juncture would necessitate additional, repetitious discovery.

In response, Kellogg maintains that the ratifications do not add new claims or parties and

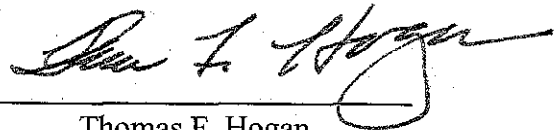
that the ratifications do not expand the amount of purchases at issue in Kellogg's case but only the number of entities that took delivery of and/or paid for the vitamins that Kellogg purchases. The sole justification offered by Kellogg for these late filed ratifications is that "[w]hen [Kellogg] filed its initial set of ratifications on May 21, 2001, Kellogg and its counsel were under the mistaken impression that those 15 companies, along with Kellogg Brasil & CIA, comprised the complete set of vitamin purchasing affiliates." Kellogg argues that permitting the ratifications will not prejudice the defendants because the ratifications do not represent new claims or parties and because defendants have not identified any additional discovery they think they need. Kellogg also argues that despite the fact that the ratifications were filed after the Court-imposed deadline, defendants were at all times protected against the risk of multiple recoveries - the exact purpose of Rule 17(a)'s real party in interest requirement, therefore striking the ratifications is unnecessary. See June 7 Op. at *4. Lastly, Kellogg notes "[e]ven if Kellogg was negligent in not identifying these eight subsidiaries sooner, negligence is not a bar to substitute the real party in interest 'in the absence of any showing of prejudice.'" Kellogg Opp. at 8 quoting Maddalone v. Okada Shosen, KK, 756 F.2d 886, 887 (1st Cir. 1985).

The Court is not convinced that allowing the ratifications would result in undue prejudice and delay. The Court recognizes that the date for notifications of discovery has passed and that defendants may need to serve additional discovery and perhaps re-open depositions that have already been completed. However, given that discovery is still being conducted and a final discovery deadline has not been set, the Court is convinced that given the opportunity to serve the needed discovery at this time will mitigate any prejudice to defendants. The Court is also not convinced that Kellogg's late filed ratifications are an improper attempt to amend the underlying complaint. The Court agrees with Kellogg's assessment that the ratifications do not add

additional claims or parties and do not expand the amount of purchases but merely clarify the actual entities that took delivery and/or paid for the vitamins that Kellogg purchased. Lastly, the Court also agrees with Kellogg - it was negligent in not identifying the eight subsidiaries sooner. Their negligence or "mistaken impression" that the ratifications were complete is a poor excuse for the delay, however, the purpose of Rule 17(a) would not be served by striking the ratifications where, as here, there is no showing of prejudice.

In conclusion, for the foregoing reasons the defendants' motion to strike is denied. Should defendants need to serve additional, non-duplicative discovery as a result of these ratifications, they will be afforded the opportunity to do so.

March 20, 2002

A handwritten signature in cursive script, appearing to read "Thomas F. Hogan", written over a horizontal line.

Thomas F. Hogan
Chief Judge

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ORDER

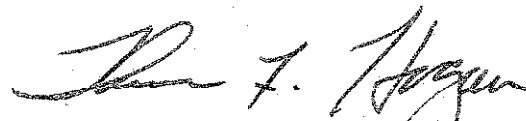
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It is hereby

ORDERED that defendants' Motion to Strike Untimely Ratifications of the Kellogg
Company is **DENIED**.

SO ORDERED.

March 20, 2002



Thomas F. Hogan
Chief Judge

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